Hovey Electric, Inc. *and* Local 692, International Brotherhood of Electrical Workers, AFL–CIO. Cases 7–CA–29066, 7–CA–29348, 7–CA–29542, and 7–RC–18936

April 11, 1991

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On May 15, 1990, Administrative Law Judge Walter H. Maloney issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions[3] as modified, to adopt the recommended Order as modified and fully set forth below, and to adopt the recommendation that the election be set aside and a new election held.

1. The judge found that the Respondent violated Section 8(a)(1) of the Act and engaged in objectionable conduct by failing to disclose a promised wage schedule after the Union filed a representation petition. The Respondent excepts, asserting that it attributed the decision not to announce the new wage schedule to the Board's election rules and therefore its conduct was not unlawful. We find merit to the Respondent's exceptions.

On March 24, 1989,[4] the Union filed a representation petition that the Respondent received about March 27. At a March 28 employee meeting, the Respondent refused to disclose a wage plan that it had promised to unveil on that date. The judge correctly found that the announced reason for not disclosing the wage schedule was that a representation petition had been filed and the Respondent wanted to play it safe under the Board's guidelines by not making any disclosures that could be construed as an interference with the election process.[5] The Board will find that an employer violates Section 8(a)(1) of the Act if the employer attributes to the union its failure to grant a benefit. *Centre Engineering*, 253 NLRB 419, 421 (1980). Contrary to the judge, we find that Respondent's stated reason for not announcing the plan did not shift the onus to the Union. Rather the Respondent simply informed its employees that it would not do anything that could be interpreted as a violation of the Board's rules. Such a statement merely indicated to employees that the Respondent wanted to be sure that it acted in a lawful manner and did not attribute the decision to the Union or the union campaign. Accordingly, we find that under the circumstances the Respondent did not violate Section 8(a)(1) of the Act by failing to disclose its wage schedule. See *Rosauers Supermarkets*, 300 NLRB 709 (1990).

2. We find that the Respondent did not violate Section 8(a)(3) or (1) of the Act by laying off employee Ted Barre. Barre had volunteered for layoff. Although the Respondent initially sent Barre an erroneous notice that he was permanently laid off, it subsequently sent Barre a corrected note with the correct designation. We find, therefore, that Barre's layoff was not permanent and, accordingly, that there is no basis for finding it unlawful.

ORDER

The National Labor Relations Board orders that the Respondent, Hovey Electric, Inc., Midland, Michigan, its officers, agents, successors, and assigns, shall

[1] The election was conducted pursuant to a Decision and Direction of Election. The tally of ballots shows 20 for and 26 against the Petitioner, with 7 challenged ballots, a sufficient number to affect the results. On February 1, 1990, the parties agreed that two of the employees whose ballots were challenged by the Union were not eligible to vote, and the judge sustained the challenges to these ballots. (In fn. 1 and in sec. B, par. 10 of the judge's decision, the judge erroneously stated that the Union withdrew two of its challenges to the ballots.) Accordingly, the remaining five challenged ballots can not affect the results of the election.

[2] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

The Respondent has also excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

There were no exceptions to the judge's findings with regard to the no-solicitation rule and the Respondent's grant of wage increases on March 20 and June 2, 1989.

[3] In sec. B, par. 4, of the judge's decision, the judge inadvertently stated that former foreman Mark Calkins attributed a statement to General Manager Ben Thomas when Calkins actually testified that either Thomas or Vice President James Hovey stated that the March 1989 layoffs were designated ''permanent'' to prevent the employees from voting in an election.

In sec. C(2), par. 2, of the judge's decision, the judge stated that the Respondent had never before laid off employees permanently to effectuate an economic retrenchment. This is not consistent with the uncontradicted testimony that the Respondent had previously laid off employees permanently. However, we agree with the judge that the Respondent violated Sec. 8(a)(3) and (1) of the Act because the Respondent designated the March 1989 layoffs permanent in order to prevent the employees from voting in the election.

We also agree that the Respondent be ordered to offer these former employees full and immediate reinstatement and to make them whole. Although the type of layoff was unlawful, the decision to lay off employees in March 1989 was lawful. Therefore, we find that the make-whole remedy begins at the time that the Respondent would have offered full reinstatement had it not unlawfully designated the layoffs permanent and runs until it offers them full reinstatement, with interest.

[4] All subsequent dates are in 1989 unless otherwise stated.

[5] The judge earlier in his decision stated that the assembled employees were told that, while the wage schedule was finalized, it would not be presented because of the Union. M. Calkins, the individual credited by the judge, actually testified that the employees were told that the Respondent could not show the wage schedule because it thought it might break the rules or the Union might file charges against it for putting the schedule out.

1. Cease and desist from

(a) Threatening to close the Company if it becomes unionized.

(b) Imposing a selective no-solicitation rule applicable only to union activities.

(c) Granting pay increases in order to persuade its employees to refrain from supporting a union; provided, however, that nothing contained herein shall be construed to authorize or require the Respondent to rescind any pay increases previously granted.

(d) Threatening to reduce its employees' job opportunities for supporting a union.

(e) Discharging employees, designating their layoffs as permanent, or otherwise discriminating against employees for supporting Local 692, International Brotherhood of Electrical Workers, AFL–CIO, or any other union.

(f) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the no-solicitation rule established in the spring of 1989.

(b) When the following discriminatees would have been recalled absent the conversion of the layoffs from temporary to permanent, offer Tom Beson, Anthony Calkins, Paul Cole, John Ehlers, Scott Fettig, Duane Hamling, Dan Matthews, Don Tomalia, Randy Wardlow, and Pat Bergeron immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or to any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the judge's decision.

(c) Remove from its files any reference to the unlawful discharges and permanent layoff designations and notify the employees in writing that this has been done and that the discharges and permanent layoff designations will not be used against them in any way.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all records necessary to analyze the amounts due under the terms of this Order.

(e) Post at its facilities in Midland, Ludington, Bay City, and Saginaw, Michigan, copies of the attached notice, marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that Case 7–RC–18936 is severed from the consolidated complaint cases, that the election conducted therein is set aside, and that Case 7–RC–18936 is remanded to the Regional Director for Region 7 to conduct a second election.

[Direction of Second Election omitted from publication.]

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten to close the Company if it becomes unionized.

WE WILL NOT impose on you a selective no-solicitation rule applicable only to union activities.

WE WILL NOT grant pay increases in order to persuade you to refrain from supporting a union.

WE WILL NOT threaten to reduce your job opportunities for supporting a union.

WE WILL NOT discharge you, designate your layoffs as permanent, or otherwise discriminate against you for supporting Local 692, International Brotherhood of Electrical Workers, AFL–CIO, or any other union.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the no-solicitation rule established in the spring of 1989.

WE WILL, when the following discriminatees would have been recalled absent the conversion of the layoffs from temporary to permanent, offer Tom Beson, Anthony Calkins, Paul Cole, John Ehlers, Scott Fettig, Duane Hamling, Dan Matthews, Don Tomalia, Randy Wardlow, and Pat Bergeron immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from the discrimination against them, less any net interim earnings, plus interest.

WE WILL notify each of them that we have removed from our files any reference to their discharges and permanent layoff designations and that the discharges and permanent layoff designations will not be used against them in any way.

HOVEY ELECTRIC, INC.

Richard J. Czubaj, Esq., for the General Counsel.
Norman E. Jabin, Esq. and *Timothy J. Rvan, Esq.*, of Grand Rapids, Michigan, for the Respondent.
Mark A. Bauer, of Bay City, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WALTER H. MALONEY, Administrative Law Judge. This case came on for hearing before me on a consolidated unfair labor practice complaint,[1] issued by the Regional Director for Region 7 of the National Labor Relations Board, which alleges that Respondent Hovey Electric, Inc.[2] violated Section 8(a)(1) and (3) of the Act. More particularly, the consolidated complaint alleges that the Respondent threatened to close the plant if the employees voted for a union, imposed on employees an overly broad no-solicitation rule, granted unscheduled pay raises to bargaining unit employees during the pendency of an organizational campaign, laid off employees on a permanent basis in order to prevent them from voting in a representation election, failed to publish an announced wage schedule during the pendency of a representation petition, threatened employees with a loss of jobs if a union prevailed, and granted a second round of pay raises while a question concerning representation was pending.[3] The Respondent denies many of these allegations, states that the pay increases that were granted were made pursuant to a wage schedule that was in preparation before the filing of the representation petition in this case, and that the no-solicitation rule fell within the parameters of permissible restrictions. On these contentions the issues here were joined.[4]

I. THE UNFAIR LABOR PRACTICES AND OBJECTIONABLE CONDUCT ALLEGED

Respondent is a small electrical contracting business owned by James and Rita Hovey. It has been in existence since 1979. J. Hovey takes an active role in the field work while General Manager Ben Thomas supervises or performs most of the office work. More than 80 percent of the Respondent's contracts are performed for the Dow Chemical Company, either at Dow's 600-acre complex at Midland, Michigan, or at other Dow facilities in Bay City, Saginaw, and Ludington, Michigan. Although the size of its work force may vary slightly, Respondent normally employs about 50 to 55 journeymen and apprentice electricians, some of whom have worked for the Company for several years. It has always operated as a nonunion shop.

In mid-December 1988, the Respondent became aware of the fact that the Union was undertaking an effort to organize the Company. At the annual Christmas party, which took place on December 23, 1988, J. Hovey addressed the assembled employees concerning the operations of the Company and its prospects at that point in time. There is no dispute that, in the course of his speech, he told employees that he had operated the Company without a union for as long as it existed and wanted to continue to do so. He also told employees that they had a right to work with or without a union and that those who wanted to work under a union contract should quit the Company and go to work elsewhere. I credit the corroborated testimony of two former employees who attended this meeting that, in the course of his remarks, J. Hovey said that if a union came into the Company, he would close its doors.

At the end of January or during the first part of February, the Union sent the Respondent a letter stating that it as undertaking a campaign to organize its employees. The letter named specified individuals who were on the organizing committee. Sometime in the spring of 1989,[5] J. Hovey visited each of the Respondent's jobsites and spoke with employees at breaktime concerning what they might or might not do in regard to campaigning for the Union on the job. Until this time, the Respondent did not have any no-solicitation or no-distribution rules. In making his comments, J. Hovey read from a 1985 publication of the ABC, an association of nonunion contractors, concerning what an employer

[1] The principal docket entries in the complaint cases are as follows: The charge filed by Local 692, International Brotherhood of Electrical Workers, AFL–CIO (the Union) against the Respondent in Case 7–CA–29066 on March 20, 1989, and amended on May 1, 1989; the complaint issued against Respondent by the Regional Director for Region 7 in Case 7–CA–29066 on May 3, 1989; Respondent's answer was filed on May 13, 1989; the charge was filed by the Union against the Respondent in Case 7–CA–29348 on June 8, 1989, and amended on June 13, 1989; the complaint and order consolidating cases issued in Cases 7–CA–29066 and 7–CA–29349 on July 31, 1989; charge was filed by the Union against Respondent in Case 7–CA–29542 on August 7, 1989; Respondent's answer to original amended complaint was filed on August 11, 1989; the second consolidated complaint in all three pending cases issued against the Respondent by the Regional Director for Region 7 on September 29, 1989; Respondent's answer was filed on October 13, 1989; the hearing was held on February 1 and 2, 1990, before me at Midland, Michigan; briefs were filed with me on or before April 4, 1990.

The principal docket entries in the representation case are as follows:

The petition was filed on March, 24, 1989, in Case 7–RC–18936, by the Union seeking to represent Respondent's employees in a unit composed of all full-time and part-time apprentice and journeymen electricians employed by the Respondent in Midland, Bay City, and Ludington, Michigan, with the usual exclusions; the Decision and Direction of Election was issued by the Regional Director for Region 7 on May 5, 1989, directing an election in that unit; the election was held on June 1, 1989, in which 20 votes were cast for the Union, 26 votes were cast against the Union, and 7 votes were challenged; 2 challenges by the Union were withdrawn at the hearing in this case; timely objections to the conduct of the election were filed in this case on June 7, 1989; order consolidating a representation case with the complaint cases issued by the Regional Director for Region 7 on August 2, 1989.

[2] The Respondent admits, and I find, that it is a Michigan corporation which maintains its principal place of business in Midland, Michigan. It is a contractor in the construction industry and performs electrical instrumentation wiring in various commercial and industrial areas in the State of Michigan. During the preceding 12 months, the Respondent, in the course and conduct of its business operations, has derived gross revenues in excess of $1 million and has performed services valued in excess of $50,000 for the Dow Chemical Company. The Dow Chemical Company annually manufactures, sells, and distributes at its Michigan plants products valued in excess of $500,000 which are shipped directly from Michigan to points and places located outside the State of Michigan. Accordingly, the Respondent is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. The Union is a labor organization within the meaning of Sec. 2(5) of the Act.

[3] The period during which objectionable conduct affecting the result of an election in this case can be considered runs from March 24 to June 1, 1989.

[4] Certain errors in the transcript are noted and corrected.

[5] J. Hovey said that these meetings took place either late in January or early in February. Others place them early in March.

may do in the face of a union organizing drive. The election in question stated:

> Make or enforce any rules requiring that oral solicitation of membership or discussion of union affairs be conducted outside of working time. (Remember, however, an employee can solicit and discuss unionism on his own time, even on company premises, when it does not interrupt work.)

There is no evidence in the record that J. Hovey's remarks related to any type of employee discussions other than talking union.

At a weekly foremen's meeting in early March, J. Hovey and Thomas told the foremen in attendance that there had been a downturn in business so the Company would have to lay off some employees. They solicited from the foremen the names of individuals who would be appropriate for layoff. A written list of employees was circulated during the meeting for this purpose. I credit the testimony of former foreman Mark Calkins that, in the course of this meeting Thomas stated that the forthcoming layoffs would be designated ''permanent'' so that the laid-off employees could not vote in a representation election. At this meeting foremen were also told that the Company was working on a wage schedule for employees. At the safety meeting for all employees that followed this foremen's meeting, Thomas announced that a new wage schedule would be made public at the next employee meeting, which was set to take place on March 28.[6] He also announced the layoffs. When an employee asked Thomas how long the layoffs would be, Thomas relied only that circumstances regarding the workload can alter this answer.

The Respondent laid off nine of its employees on March 8 and 10 and two more on March 31 and April 7, respectively.[7] In each instance, the layoff notice stated that the Company's action was a reduction in force. On the printed layoff notice form, the Respondent typed above the printed phrase ''layoff notice'' the word ''permanent.''

On March 20, the Respondent gave pay increases to 24 of its remaining electricians. Of the 24 increases, some 18 were in differing amounts. Individual increases ranged from 25 cents an hour to $1.50 an hour. The actual dollar amounts of the new hourly rates ranged from $7 an hour to $15.25 an hour. When it made these increases, the Respondent gave no notice, either publicly or to the affected employees, that anyone would be receiving more money. The 24 employees whose rates were raised simply found more money in their weekly paychecks.

On March 24, the Union filed the representation petition in this case. The Respondent received this petition on or about March 27. When the foremen's meeting took place on March 28 preliminary to the safety meeting for all employees, the Respondent announced that, because of the filing of the representation petition, it would not be announcing the promised pay schedule, even though it was already in effect. At the meeting involving all employees, the Respondent discussed the filing of the representation petition and certain guidelines for employer and employee conduct during a representation campaign that are contained in a Board leaflet distributed by the Regional Office. The Respondent announced that it did not feel comfortable about giving out any details about the wage schedule in light of the filing of the petition. I credit testimony of one former employer who attended this meeting that Thomas told the assembled employees that, although the wage schedule was finalized, it could not be presented to employees because of the Union. The Respondent has never disclosed the new age schedule to its employees nor did it place a copy of the schedule in the record in this case.

At a foremen's meeting held early in April, Thomas distributed lists of employee names to various foremen in attendance and solicited their opinions as to the union sympathies of the listed employees. Foremen were asked to indicate opposite each name whether the employee was for or against unionization and, if the foreman was uncertain, simply to indicate this fact with a question mark. After the lists were marked, they were collected by Thomas and placed in a company file.

On May 30, the day before the election, Thomas had an extended discussion of the forthcoming election with all the employees who were currently on its payroll. This discussion, which lasted more than half an hour, was taped and a transcript of the tape was placed in the record. The overall theme of the discussion was an effort on the part of Thomas to convince employees to vote against the Union. The General Counsel has focused attention on the following statements, which were made by Thomas in the course of the discussion:

> If the Union gets voted in and we don't get more work, what happens to the people on existing jobs? You asked that question, too? Uh . . . I guess nothing different whether we are union or non-union. I don't think that has any significance, ok. Whatever, if you can't stop layoffs, you can't stop layoffs. If we have to try and find other work for you, we have to try and find other work for you. I do know one thing. We won't have the flexibility, ok? If we slow down, if we are slow in work, and we want to bring you into the shop for four days, it's going to be tough shit. Sorry,the union wont allow that.
>
> . . . .
>
> One more thing. Maybe I should also apologize for the fact that we have some guys that work part-time for us—Larry and Bob . . . . The union did not want them in the bargaining unit. Maybe I should say sorry. Do you know what those guys do for us. They keep everybody else. They give us more steady employment. Right now, they're off. You know why they're off? Because we don't have enough work. They take the time out to help everyone of us have more steady employment. Now, if they worked for the union they'd have to work full time and not allowed to be reasonable employees. What would we do? We'd lay off somebody else. We'd lay off somebody who could probably feel

[6] Normally the Respondent held a meeting for all employees once a month. It as generally referred to as a safety meeting although matters other than safety were often discussed. The next regular safety meeting would normally not have occurred until early April but it was set for late March because J. Hovey and his wife would be on vacation in early April.

[7] Those laid off either on March 8 or 10 were Tom Beson, Anthony Calkins, Paul Cole, John Ehlers, Scott Fettig, Duane Hamling, Dan Matthews, Don Tomalia, and Randy Wardlow. Pat Bergeron was laid off on March 31 and Ted Barre was laid off on April 7. Barre's layoff was later changed from permanent to temporary.

> the pinch. Maybe I should say we're sorry for that too. We can try to do those things to be more competitive, to be more flexible in our dealings, in our work, and all the things that we have with Dow. We try to be flexible. We try to get people—we talked about Kurt today. He comes and helps pull wire. We don't lay him off when there's no pipefitting work. Something wrong with that? You bet if we go union, he's going to go home. Yeah, we are all worried.

On the following day, the Union lost the election by a vote of 26 to 20. Seven votes were challenged but, with the withdrawal of two of those challenges, they no longer were determinative of the results.

The election took place on Thursday, June 1. On the following Friday, Thomas gave pay increases to 26 employees who voted in the election. On June 2, he signed forms effectuating these raises and entered the information in the Respondent's computer. The increases ere included in paychecks issued the following Monday. However, the increases were retroactive and applied to all time worked by these 26 employees during the preceding week. Entries on each pay record indicated that each raise was given ''per wage schedule.'' The amounts of the raises ranged from 45 cents to $2 per hour. The 24 employees receiving these raises ended up with hourly rates ranging from $7.75 to $15 an hour. The raises were given in nine different amounts.

On July 13, 1989, the Respondent sent a letter to all the employees who had been permanently laid off in March. It stated as follows:

> Hovey Electric may soon be hiring apprentice electricians for work in the Midland area and Ludington area.
>
> Before considering other personnel for these positions, we are inviting you to apply for these potential openings. If you are rehired, your rate of pay will be the same as when you were separated from Hovey Electric.
>
> Please contact Ben Thomas or Jim Hovey at 631–2023 or stop by our office before July 19, 1989 if you are interested. If we do not hear from you by July 19, 1989, we will assume you are not interested in employment at Hovey Electric.

Three or four employees made inquiries following the receipt of this letter but none were rehired.

II. ANALYSIS AND CONCLUSIONS

A. *Independent Violations of Section 8(a)(1) and Objectionable Conduct*

(a) I have credited testimony to the effect that, in December 1988, before the beginning of the protected period for evaluating objectionable conduct, J. Hovey told employees, in the course of a speech largely devoted to expressing his opposition to unionism, that be would close the business if it became unionized. This is a blunt and overt threat that violates Section 8(a)(1) of the Act and which establishes the context in which other alleged acts of misconduct should be evaluated.

(b) After receiving written notice from the Union that it was going to begin organizing the Company, J. Hovey instituted a rule, announced at small gatherings of employees, that employees should not discuss union matters on working time. The Respondent argues that such a rule is lawful under a line of cases which permit discussions of unionism on companytime while forbidding such discussions on working time See *Our Way*, 268 NLRB 394 (1984), and cases cited therein. What this argument fails to take into account is that a no-solicitation or no-distribution rule is valid only if it includes solicitations or distributions relating to all nonwork-related matters, not just union talk. *T & H Investments, Inc.*, 291 NLRB 409 (1988), enf. mem. 899 F.2d 19 (9th Cir. 1990). Moreover, an otherise valid rule that is imposed in response to a union organizing drive and is prompted by antiunion motivation is invalid on that ground alone. *Pedros Restaurant* 246 NLRB 567; *F. Mullins Construction*, 273 NLRB 1016 (1984). In this case Hovey's response to a letter that the Union was organizing the Respondent's employees was not to promulgate a generally applicable no-solicitation rule but to tell employees that their right to talk unionism on the job was different and more restrictive than their right to talk about anything else. Accordingly, this rule violates Section 8(a)(1) of the Act. Like the threat to close the business which was uttered by J. Hovey at the Christmas party, the imposition of this rule took place before the filing of the petition and does not constitute objectionable conduct.

(c) On March 20, 1989, the Respondent gave unscheduled pay increases to employees who constituted approximately 40 percent of its electricians. The past practice of this employer as to give individual pay increases at irregular and unspecified times. It often occurred that increases for apprentices would be granted in December or in May when an apprentice completed a course at the ABC apprentice school for electricians. However, the increases in mid-March 1989 did not coincide with any of these events nor did this occasional past practice apply to journeymen electricians. The routine way that an employee received a pay increase as to be recommended for an increase by his foreman on an individual basis.

The Respondent had told its employees that it was putting together a pay schedule which would control the wages paid at the Company. However, as discussed, infra, it never disclosed the contents of this schedule to employees nor did it place the schedule in evidence in this case. Thomas stated in his testimony that the wage plan was, in effect, a set of general guidelines. ''We hadn't structured it firmly yet because we wanted to get more people involved. It was a set of guidelines to be refined . . . in the course of time. The only aspect we had changed (to our past practice) as a schedule.'' In his opening statement, counsel for the Respondent stated that ''the unstructured nature of the wage plan previously continued throughout this period of time in such a manner as to be appropriate and proper under the guidelines.'' J. Hovey said that what the Company had prepared was a wage level, a monetary amount for each level of apprentice education achieved. For journeymen, the Company also had a monetary amount for them representing their further education beyond apprentice training. According to him, longevity played a part in formulating the plan.

As noted above, the 24 increases made on March 20 were given in 18 different amounts, with individual increases ranging from 25 cents to $1.50 an hour. The new hourly rates ranged from $7 an hour to $15.25 an hour. I conclude from this evidence—and from the failure of the Respondent to produce its so-called age plan—that there never was such a plan or schedule and that, in March 1989, the Respondent was continuing to follow its past practice of giving individual increases to employees based on individual evaluations. The actual increases given dispel any notion that the Respondent had adopted any plan or schedule worthy of the name. Moreover there is no suggestion in the Respondent's testimony, even if credited, of what the timing of increases might be under the so-called plan and how that timing would justify an increase or series of increases on the date when they were given.

It is well settled that a pay increase given during an organizing campaign is presumptively a violation of Section 8(a)(1) of the Act. *NLRB v. Exchange Parts Co*., 375 U.S. 405 (1964). The only difference brought about by filing of a representation petition is that subsequent unfair labor practices also constitute objectionable conduct. *Dal-Tex OpticaI Co*., 131 NLRB 1782 (1962). In this case, the increases in question were granted 4 days before the filing of the petition. Regardless of the pendency of a representation petition, an employer may rebut the presumption of illegal conduct by showing that the wage increase was part of a regular program or that it as dictated by economic necessity. The reasons advanced here by the Respondent fall far short of any such justification. Moreover, the reasons advanced were offered by a respondent whose strong animus as manifest from collateral evidence in the record. Accordingly, I conclude that, by granting pay increases on March 20, 1989, the Respondent here violated Section 8(a)(1) of the Act.

(d) The General Counsel alleges that on March 28, a date within the *Goodyear* period,[8] the Respondent violated Section 8(a)(1) of the Act by refusing to disclose to its employees a wage plan that it had promised to unveil on the date. There is no dispute about the Respondent's promise. At an employee meeting of March 7, it told employees that it would disclose the new wage plan it had been working on for several months at the next employee meeting. That meeting took place on March 28, 4 days after a representation petition as filed by the Union. The rationale advanced by the employer for withholding this information is difficult to understand. The Respondent had given a wage increase to 24 employees 8 days earlier, an increase that violated the Act because it took place during an organizing drive and placed any objective justification. However, its announced reason for keeping the general contents of the plan secret as that a representation petition had been filed and the Respondent wanted to play it safe under the Board's guidelines by not making any disclosures which could be construed as an interference with the election process. In fact, the disclosure of a plan—if indeed, such a plan existed—could have served as a possible justification for the violation that had already been committed by carrying the alleged plan into effect.

I think the Respondent as toying with its employees on the question of a wage plan. Most employees looked forward with some gratification to the announcement of a wage plan since it could provide some degree of order to a personalized and highly subjective wage program. The existence of such a plan could properly be deemed a benefit. When the Respondent withheld disclosure of the plan and then blamed the Union for this turn of events, as Thomas did in his statement at the March 28 meeting, the Respondent was interfering with the exercise of rights guaranteed to employees by Section 7 of the Act and engaging in objectionable conduct which could affect the outcome of an election.

(e) On May 30, Thomas gave a long preelection speech to a massed assembly, the thrust of which was to urge employees to reject the Union. In the course of that speech, Thomas told employees that, in the event of unionization, their job opportunities during slack periods would be reduced because the Union would forbid the Company from engaging in such current practices as laying off part-time employees or bringing journeymen into the shop to work when installation work was light. These practices permitted the retention of employees during economic downturns but, according to Thomas, they would be discontinued in the event of unionization and electricians would suffer.

Following the Supreme Court's lead in *Gissel*,[9] the Board has held in a series of cases that employer predictions of the dire effects of unionization arising out of consequences beyond the employer's control must have an objective factual basis in order to be permissible under Section 8(a)(1) of the Act. *Blaser Tool & Mold Co*., 196 NLRB 374 (1972); *Long-Airdox Co*., 277 NLRB 1157 (1986); *Laidlaw Transit*, 297 NLRB 742 (1990). There was and is no objective basis for Thomas' statement that the union involved in this proceeding would not permit either part-time employment or flexibility in assignments to provide work during economic downturns. Unlike preelection statements reported in other cases and relied on by the Respondent to justify Thomas' prediction of consequences, the statements he made to employees on the eve of the election in this case were not generalizations about the overall policies and practices of trade unions or an expression of opinion about the general effects of unionization. Thomas stated that this union insisted on employment practices which would force the Company to discontinue existing practices designed to maximize employment opportunities. As a result, the Company would be forced by unionization to lay off employees in greater numbers during slow periods than it currently did. To borrow Thomas's expression, it would just be ''tough shit'' for those faced with layoffs. Because his prediction of consequences had no objective basis in fact, it was nothing other than a baseless threat aimed at intimidating voters who were about to go to the polls at the end of a representation campaign. His statement violated Section 8(a)(1) of the Act and was objectionable conduct that could affect the outcome of an election.

(f) On the day following the union defeat at the election, Thomas took steps to give a second pay raise in a 10-week period to a significant portion of the Company or force. This increase was made the day after the election and as effectuated while a question concerning representation was pending. There as no greater objective justification for this pay increase than for the one granted in March. Although company records indicate that the raises were given ''per wage schedule,'' no one has ever seen that wage schedule to verify this fact. Coincidentally, the number of employees receiving increases as the same number as those who supported the company position at the election. However, to make out this type of violation of Section 8(a)(1) of the Act, the General

[8] *Goodyear Tire & Rubber Co*., 138 NLRB 453 (1962).

[9] *NLRB v. Gissel Packing Co*., 395 U.S. 575, 617–619 (1969).

Counsel is not called on to prove company knowledge, as he is in a discharge case. It is sufficient to establish that an obvious and unexplained inducement to stay with the Company was granted to employees at a time when the possibility of a rerun election was still ripe. *Marcus J. Lawrence Memorial Hospital*, 249 NLRB 608 (1980); *Edward A. Utlaut Memorial Hospital*, 249 NLRB 1153 (1980). In light of the circumstances of the June 5 increase and the failure of the Respondent to justify its action, I conclude that the age increases granted on that date violated Section 8(a)(1) of the Act.

B. *The Permanent Layoffs in March and April 1989*

The Respondent laid off nine employees early in March 1989 and two more a month or so later. There is record evidence that the Respondent had been suffering a reduction in the contracts it as receiving from its major customer, Dow Chemical, during that period of time, so the General Counsel takes no issue with its decision to lay these individuals off. What the General Counsel alleges is that the decision of the Respondent to treat these layoffs as permanent (and hence as discharges), rather than as temporary layoffs as discriminatorily motivated and thus a violation of Section 8(a)(3) of the Act.

This Respondent had never before laid off any employees permanently to effectuate an economic retrenchment. Because over the years it had enjoyed a steady source of income from a single source, the stability of its level of employment has been remarkably firm, especially for the building and construction industry. The company office forms used in layoff situations contained no reference to the character of the layoff. In each of the present instances, the Respondent typed the word ''permanent'' above the name of the laid-off employee to designate what it was doing with unmistakable clarity. In fact, it is dubious that the layoffs in question were permanent. The employees who were laid off were sent letters by the Company some 90 days later notifying them that the Company as getting ready to hire. It invited these individuals to apply for their former jobs at their former pay rates. A few indicated interest but no one actually returned. Most had found better paying jobs in the unionized segment of the electrical industry.

The legal effect of treating these 11 individuals as permanent discharges would be that they could not vote in any representation election following their discharges since they were permanently separated from the Company. On the other hand, employees who were temporarily laid off could vote in a representation election if they had a reasonable expectancy of recall. *Atlas Metal Spinning Co*., 266 NLRB 180 (1983). The Respondent argues that, in designating the nine employees laid off in early March as permanent layoffs, it could not have had any intention of precluding them from voting in an election since there was no representation petition on file at that time. It makes no argument concerning the two who were laid off after the filing of the petition and whose layoffs were also termed ''permanent.''

This case deals with an employer who went to great lengths, some legal and others patently illegal, to prevent the Union from winning the election held on June 1. It threatened to close the business in the event of unionization, granted two illegal pay raises to persuade employees to vote against the Union, imposed an illegal no-solicitation rule on employees focused solely on talking union, and threatened employees with a reduction in job opportunities if the Union won. Moreover, I have credited testimony that either Thomas or J. Hovey stated at a foremen's meeting on March 7 that the employees to be laid off would be treated as permanent layoffs in order to prevent them from voting in a representation election. In light of this evidence, I conclude that, by laying off the 11 discriminatees named in the consolidated complaint on a permanent basis, the Respondent here violated Section 8(a)(1) and (3) of the Act. The last two permanent layoffs took place following the filing of the representation petition and thus constitute objectionable conduct which could affect the result of the election.

CONCLUSIONS OF LAW

1. Hovey Electric, Inc. is now, and at all times material has been, engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 692, International Brotherhood of Electrical Workers, AFL–CIO is a labor organization within the meaning of the Act.

3. By permanently laying off Tom Beson, Anthony Calkins, Paul Cole, John Ehlers, Scott Fettig, Duane Hamling, Dan Matthews, Don Tomalia, Randy Wardlow, Pat Bergeron, and Ted Barre, in order to prevent them from engaging in union activities, the Respondent here violated Section 8(a)(3) of the Act.

4. By the acts and conduct set forth above in Conclusion of Law 3; by threatening to close the business in the event of unionization; by granting pay raises to employees during the pendency of a union campaign and during the pendency of a question concerning representation; by imposing a selective no-solicitation rule which was prompted by antiunion considerations; by threatening the loss of employment opportunities in the event of unionization; and by failing to disclose a promised wage plan and blaming its action on the Union, the Respondent here violated Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices have a close, intimate, and substantial effect on the free flow of commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that the Respondent here has engaged in certain unfair labor practices, I will recommend that it be required to cease and desist therefrom and to take certain affirmative actions designed to effectuate the purposes and policies of the Act. Because the independent violations of Section 8(a)(1) of the Act found here are repeated and pervasive and evidence a disposition on the part of this Respondent to violate the rights of its employees, I will recommend to the Board a so-called broad 8(a)(1) remedy designed to suppress any and all violations of that section of the Act. *Hickmott Foods*., 242 NLRB 1357 (1979). The letters written to discriminatees in July 1989, soliciting them to apply for work fall far short of what the Board requires in an offer of reinstatement. *W. C. McQuaide, Inc*., 220 NLRB 592 (1975), enfd. in part 552 F.2d 519 (3d Cir. 1977), and 239 NLRB 671 (1978), enfd. 617 F.2d 349 (3d Cir. 1980). Therefore the recommended Order will require the Respondent to offer full and immediate reinstatement to Tom Beson, Anthony

Calkins, Paul Cole, John Ehlers, Scott Fettig, Duane Hamling, Dan Matthes, Don Tomalia, Randy Wardlow, Pat Bergeron, and Ted Barre to their former or substantially equivalent employment, without prejudice to their seniority or to any other rights and benefits which they previously enjoyed, and to make them whole for any loss of earnings which they may have sustained by reason of the discriminations practiced against them, in accordance with the *Woolorth* formula,[10] with interest at the rate prescribed by the Tax Reform Act of 1986 for the overpayment and underpayment of income tax. *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The recommended Order will also require the Respondent to post the usual notice, informing employees of their rights and of the results in this case.

[Recommended Order omitted from publication.]

[10] *F. W. Woolworth Co*., 90 NLRB 289 (1950).

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